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In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, *Appellant*,

vs.

EL PASO NATURAL GAS COMPANY, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION.

MOTION OF EL PASO NATURAL GAS COMPANY TO AFFIRM THE JUDGMENT

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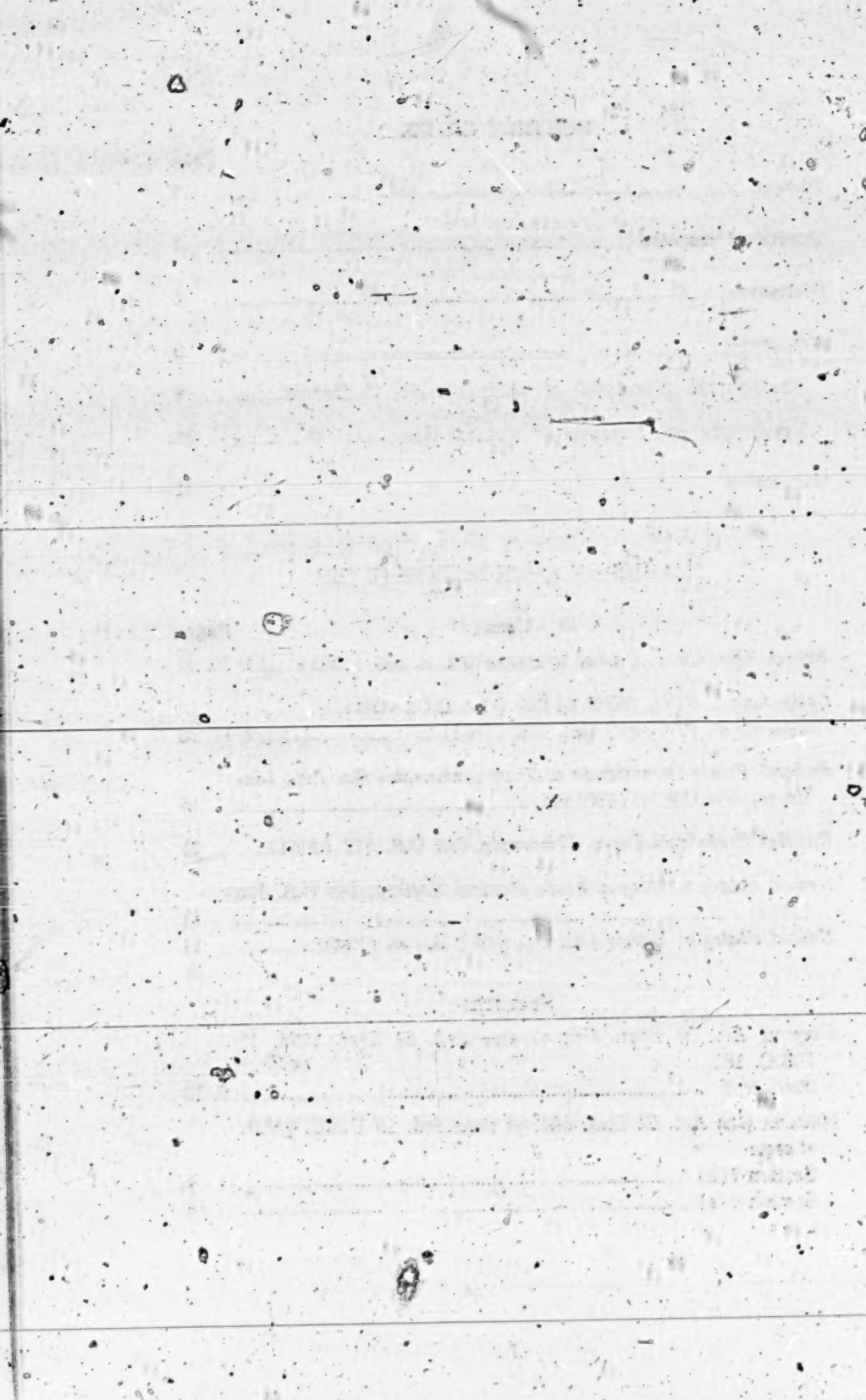
SUBJECT INDEX

	Page
Motion	1
Question Presented	1
Statement	6
Argument	9
Transportation and Sale of Natural Gas to California	9
Production and Purchase of Natural Gas	21
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Pages
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	9, 10, 20
California v. FPC, 296 F.2d 348 (C.A.D.C., 1961)	18
California v. FPC, 369 U.S. 482 (1962)	2, 17, 22
Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961)	15
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954)	21
United States v. Oregon State Medical Society, 343 U.S. 326 (1952)	11
United States v. Yellow Cab Co., 338 U.S. 338 (1949)	11

Statutes	
Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18:	
Section 7	1, 9, 10
Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. § 717, *et seq.*:	
Section 7(b)	4
Section 7(e)	18



In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 944

UNITED STATES OF AMERICA, *Appellant*,

vs.

EL PASO NATURAL GAS COMPANY, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MOTION OF EL PASO NATURAL GAS COMPANY TO AFFIRM THE JUDGMENT

Appellee El Paso Natural Gas Company, pursuant to Rule 16 of the Revised Rules of this Court, moves that the final judgment and decree of the District Court be summarily affirmed on the ground that appellant presents no substantial question for decision by this Court.

QUESTION PRESENTED

The Government commenced this action on July 22, 1957. It alleged that the acquisition of the common stock of Pacific Northwest Pipeline Corporation ("Pacific Northwest") by El Paso Natural Gas Company ("El Paso") in early 1957 violated Section 7 of the Clayton Act. The complaint was subsequently amended to allege that El Paso's acquisition of Pacific Northwest's assets by merger in December 1959, pursuant to order of the Federal Power Commission, also violated Section 7 of the Clayton Act.

The complaint (Par. 15) charged anti-competitive effects (1) in the transportation and sale of natural gas in "several western states", so that all other potential competitors might be excluded and El Paso control all transmission of out-of-state and foreign gas into the western states, and (2) in the production and purchase of natural gas in the San Juan Basin and other natural gas fields.[1]

Much of the Government's evidence was devoted to an attempt to prove that there were six overlapping geographic "markets" involved in the issues concerning the transportation and sale of natural gas, including an eleven-state market, a ten-state market, an eight-state market, a three-state market, a market consisting of the state of California, and a market consisting of Southern California. The Government offered several charts and tables (GX 3-50)[2] and alleged expert testimony (*Gaffey*, Tr. 50-91, 117-55) in an effort to demonstrate El Paso's market "shares" and thereby its market "dominance" in the areas in which it or Pacific Northwest sold natural gas.

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1. The trial was held in September 1962, with final oral argument in October, following this Court's decision on April 30, 1962, *California v. FPC*, 369 U. S. 482, that the Clayton Act issues be tried in the District Court. The trial, including oral argument, took seven days. The Government called 13 witnesses and El Paso called five witnesses. Among the witnesses were responsible executives of all the important California, Washington and Oregon distribution companies involved and of Southern California Edison Company, as well as the Chairman of the Board and the President of El Paso. There were 822 pages of transcript and 247 numbered exhibits. Several exhibits consisted of scores of pages of testimony in other proceedings and in depositions in this action. Certain exhibits incorporated several documents within one exhibit number.

2. "GX....." refers to exhibits introduced by the Government; "DX ...." refers to exhibits introduced by the defendant; "Tr. ...." refers to the trial transcript; "Fdg. ....." refers to the District Court's Findings of Fact and Conclusions of Law; "Jur. St., p....." refers to the Government's Jurisdictional Statement. References to testimony in the transcript and exhibits are preceded by the name of the witness.

It was proved at the trial, and the Court found (Fdgs. 54-66), that prior to the acquisition El Paso and Pacific Northwest never served the same markets or the same buyers.[3] Pacific Northwest was designed, certificated and built to serve, and served principally, the northwestern states of Oregon, Washington and Idaho. El Paso served principally the southwest states and California. (Fdgs. 22, 31-2) Indeed, California (where Pacific Northwest never served) is the only area where the Government has urged any substantial competition or probability of future competition between El Paso and Pacific Northwest.

It was also proved at the trial and found by the Court (Fdgs. 79-80) that—despite the prognosis in the complaint of permanent exclusion of other potential competitors and control by El Paso of the transmission of out-of-state and foreign gas into the western states—since 1957 two other major pipelines have been certificated to transport and sell over 700 million cubic feet daily of natural gas to California, and Canadian gas is now being brought into this country for sale in the west by Pacific Gas and Electric Company ("PG&E"). The two major pipelines which have entered the California market since the acquisition are Pacific Gas Transmission Company, an affiliate of PG&E, and Transwestern Pipeline Company, an interstate pipeline formed by various producer interests, including Gulf Oil Corporation and Warren Petroleum Corporation. In addition, certification proceedings are pending before the Federal Power Commission for other pipelines to transmit gas to southern California. See pp. 14-16, *infra*.

Further in contravention of the Government's claims of market "dominance" by El Paso as a result of the merger,

3. There were sales of gas for use in Utah by an El Paso subsidiary, Utah Natural Gas Company (from relatively small intrastate reserves in Utah), and by Pacific Northwest which were found to have no competitive significance (Fdgs. 25, 56-8).

it was found by the Court (Fdg. 53) that in the natural gas industry the segments of market demand served pursuant to certificates issued by the Federal Power Commission are removed from competition.[4] The corollary of this effect of certification is that competition for the transportation and sale of natural gas is limited to new and unsatisfied demand for gas. It was proved at the trial, and found by the Court (Fdg. 87), that El Paso has no advantage over its competitors to supply future market demand for interstate gas in California or any part thereof.

In its appeal to this Court, the Government has abandoned most of what it unsuccessfully urged to the District Court on that portion of its case dealing with the transportation and sale of natural gas, and has also thereby discarded much of the proof which formed the framework of its case.

Thus, the Jurisdictional Statement (pp. 13-14) abandons the Government's previously alleged multi-state "markets" and confines the Government's appeal on this aspect of the case to the alleged "anti-competitive effect in the California and Southern California markets".

The Government now adopts as its own, for the first time, the proposition urged by El Paso and found by the District Court that certificated portions of market demand are "withdrawn from the market and insulated from further competition" (Jur. St., p. 19). It likewise adopts the proposition that competition is limited to new and unsatisfied demand for gas (pp. 19-20) and does not dispute, as the record proved, that El Paso has no competitive advantage in California. The Government thereby completes the logical demolition of its market "dominance" argument which,

4. Under Section 7(b) of the Natural Gas Act, also, a company performing a certificated service has the duty to continue to perform that service, under penalty of criminal sanctions, until authorized by the Federal Power Commission to abandon or discontinue the service. 15 U.S.C. § 717f(b).

for California as elsewhere, was based primarily, if not entirely, upon El Paso's certificated market "shares".

Hence, the Government's appeal in this Court on its charge that the acquisition of Pacific Northwest by El Paso had the proscribed anti-competitive effect on the transportation and sale of natural gas in "several western states" has been reduced to the assertion that the probable future effect of the acquisition will be substantially to lessen competition to serve new and unsatisfied increments to the demand for natural gas in California, particularly southern California. (Jur. St., pp. 17-22, 30).[5] In disregard of the market facts, its claim here is that Pacific Northwest was and would have continued to be a substantial "competitor" in California, a claim which it did not, and could not, prove at the trial and which is in direct derogation of the facts, the record and the findings, as we shall demonstrate below.

The above constitutes the bulk of the Government's appeal. In addition, the Jurisdictional Statement addresses itself briefly (pp. 31-2) to the alleged anti-competitive effect of the acquisition "in the purchase of natural gas reserves in the San Juan Basin and Rocky Mountain areas."

The sole question presented on appeal, therefore, is whether the District Court was clearly in error in finding that the Government failed to sustain its burden of proving by a preponderance of evidence a reasonable probability that the acquisition and merger would have the effect of substantially lessening competition (1) in the transportation and sale of natural gas to California or southern California, or (2) in the acquisition of natural gas in the San Juan Basin and the Rocky Mountain area.

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5. The Government's Notice of Appeal and Jurisdictional Statement (*e.g.*, pp. 2, 22) consistently describe the alleged effect only in terms of substantial lessening of competition. No claim is made in this appeal that the acquisition and merger may tend to create a monopoly.

STATEMENT

After negotiations in 1955 and 1956, El Paso in January 1957 acquired more than 80% of the common stock of Pacific Northwest pursuant to its exchange offer of January 8, 1957, and by May 1957 had acquired 99.8% of said stock (Fdg. 5).[6]

At the time of the acquisition, El Paso was producing and purchasing natural gas in various gas fields and transporting and selling the gas, principally for resale, in California and the southwest states of Arizona, New Mexico, Nevada and Texas. Its natural gas supplies and reserves and pipeline system were dedicated to the performance of its long-term gas supply contracts authorized and certificated by the Federal Power Commission. (Fdgs. 21-2, 48-50, 111)

Pacific Northwest had sources of natural gas supplies and reserves in the San Juan Basin and other areas along the route of its pipeline, and transported through its pipeline system and sold the gas in the northwest and mountain states of Washington, Oregon, Idaho, Wyoming, Colorado and Utah. Its natural gas supplies and reserves and pipeline system were dedicated to sales of natural gas in its service areas under the terms of supply contracts authorized and certificated by the Federal Power Commission up to the capacity of its pipeline. (Fdgs. 29-31, 51-2, 111)

Prior to and at the time of acquisition, a major portion of El Paso's gas supply consisted of "residue" gas produced in connection with oil. Utilization of such gas involves difficult operating problems. The availability of "residue" gas is dependent upon the production of oil by other companies, which fluctuates from day to day, and not upon El Paso's demand for gas. Since "residue" gas is produced as a

6. The assertion that El Paso paid a premium for Pacific Northwest stock (Jur. St., pp. 11-12) is based on a meaningless comparison of market value of El Paso stock with book value of Pacific Northwest's assets.

by-product of oil, it must be taken as oil is produced. But oil production, which is subject to state prorationing, varies not only daily and monthly and also with temperatures and seasons. As a result, in order to market a substantial amount of "residue" gas (and thereby avoid the waste by "flaring" of such gas), it is necessary to have sources of "dry" gas produced from gas wells, the flow of which is adapted to the demand for natural gas, so as to balance daily requirements of supply against wide fluctuations in "residue" gas supply (Fdg. 26; *Kayser*, Tr. 556-63).[7]

At the time of the acquisition and for several years prior thereto, El Paso also had a serious gas reserve problem. By 1956 the Federal Power Commission and its Staff had seriously questioned the sufficiency of El Paso's natural gas reserves. In July 1956, the Staff asserted that El Paso had but a two to three-year supply to meet its long-term certificated commitments. The Federal Power Commission subsequently, in December 1956, agreed with the Staff in this respect. (Fdg. 27)

Pacific Northwest had acquired, in the San Juan Basin and other areas in the Rocky Mountains, a large volume of dry gas reserves as yet undeveloped. Its major reserves were covered by leases of acreage which it was required to develop in accordance with the terms of the lease or risk the loss of the acreage and the reserves contained therein. However, it lacked the financial resources effectively to develop its existing reserves.[8] In addition to this surplus of

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7. El Paso's supply of "residue" gas has varied as much as 500 million cubic feet from day to day. El Paso commenced in 1948 to develop "dry" gas reserves in the San Juan Basin to offset violent swings in the daily availability of "residue" gas. (Fdg. 26)

8. The "deliverability" of San Juan wells (i.e., rate of flow as distinguished from amount of reserves) is low and a serious decline in deliverability was demonstrated when production commenced (*Silloway*, DX G, p. 121; *Fish*, GX 299, p. 58).

undeveloped resources, Pacific Northwest had access to Canadian sources of gas through an agreement entered into with Westcoast Transmission Company Limited on December 11, 1954. (Fdgs. 33, 36-7)

There is no evidence that El Paso had any anti-competitive purpose in acquiring Pacific Northwest. El Paso's purpose since the end of 1954 in seeking to acquire Pacific Northwest's assets or stock was to gain access to the Rocky Mountains and Canada and to obtain additional gas supplies and reserves (particularly "dry" gas resources to balance its "residue" gas resources), in conformity with admonitions of the Federal Power Commission and its Staff. The additional gas resources were required to replace its existing resources as they were being exhausted in supplying its certificated contract commitments and to enable it to serve its certificated contract commitments in the future. After the stock acquisition and merger, the combined resources were no more than sufficient to enable El Paso to fulfill its certificated contract commitments. (Fdgs. 40, 87)

It is not disputed, and the District Court found, that the acquisition and merger had substantial public benefits and advantages. Because of its financial problems, Pacific Northwest was not in a position to assist its distribution company customers to develop the market for natural gas in the Northwest (Fdg. 38). El Paso's financial resources enabled it, following the acquisition, to promote the market for natural gas in the northwest area in competition with electricity and fuel oil, and to provide extensive facilities and extensions which Pacific Northwest could not have undertaken alone. El Paso has been able to maintain a rate structure in Oregon and Washington more favorable to the public than Pacific Northwest could have maintained. Competition in Oregon and Washington of natural gas with

electricity and fuel oil has been made more effective than it otherwise would have been. The stock acquisition and merger also benefited customers in the areas previously served by El Paso by making available supplies and reserves of "dry" gas needed to assure future public service in the fulfillment of El Paso's certificated contract commitments. (Fdgs. 127-130)

ARGUMENT

Transportation and Sale of Natural Gas to California.

In order to establish a violation of Section 7 of the Clayton Act, the Government had the burden of proving a reasonable probability that the acquisition would cause a substantial lessening of competition or a tendency toward monopoly. To determine that issue, as Congress has indicated and this Court has emphasized, the acquisition must be "functionally viewed, in the context of its particular industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-2 (1962).

The Government pitches its appeal here on the assertion that Pacific Northwest was a substantial potential competitor to transport and sell gas to California or southern California and that its acquisition by El Paso resulted in the proscribed substantial effect on future competition in California.

What did the Government offer to meet its burden of proof in this respect? It is said that, prior to the acquisition, an unsuccessful attempt was made by Pacific Northwest to sell to Southern California Edison Company ("Edison"), and unsuccessful advances were made to PG&E. The Jurisdictional Statement also refers to the "eagerness" (p. 22) of Pacific Northwest and to its "continuing interest in California" (p. 21). From this it is argued that Pacific North-

west, had it not been acquired, would have made continued attempts to put together projects and to "compete" for future increments of California gas demand (Jur. St., pp. 21-2, 29).

The story of these unsuccessful dealings of Pacific Northwest establishes only that it was *not* in 1956 and at the time of the acquisition able to put together a project to transport and sell natural gas to California. If evidence at all as to the future, it is evidence of inability to do so in the future.

The other fact referred to in the Jurisdictional Statement concerning Pacific Northwest—a pipeline company certificated to the full extent of its facilities and reserves to serve the Northwest—is that it was capitalized for $250,000,000 for *that* project, with its pipeline accessible to regions where there was the possibility of successful exploration for gas and passing within 550 miles of the California border. (Jur. St., pp. 25-6)

There was no evidence that its capital or the location of its pipeline gave to Pacific Northwest any advantage should it seek to enter California to serve that state's future unsatisfied demands. No evidence was offered indicating any reasonable prospect of either its financial ability to construct a pipeline to California, or serious consideration by any buyer in California of a Pacific Northwest proposal, or the ability of Pacific Northwest at any future time to provide the additional gas supplies necessary to make a genuine offer.[9]

Although the Jurisdictional Statement is couched in language purporting to tender a question of law, all that appellant here truly asserts is that the District Court committed

9. Mere possibilities or remote contingencies do not form a basis for finding illegality under Section 7 of the Clayton Act. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, and fn. 39 on 323 (1962).

clear error in the findings of fact on which the judgment and decree for the defendant were predicated. The Government here is not in fact seeking an appellate review but actually a trial *de novo* upon the record made in the trial before the District Court, a setting aside of the District Court's findings, and the adoption of contrary findings by this Court. This Court has held that it will not do so. *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949); *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952).

It is clear from the findings that the District Court, as it was required to do, considered in the functional context of the natural gas industry whether Pacific Northwest was in fact a substantial competitive factor in California, and found that the Government had not sustained its burden in that respect (Fdgs. 66, 90-95). It is also clear from the findings that the District Court considered, as it was required to do, the entire competitive situation of the natural gas industry in California further to test whether there was a reasonable probability of the acquisition and merger resulting in an injury to competition. It reviewed the market demand for interstate natural gas in California in terms of specific buyers (Fdgs. 67-74, 87, 90-5), Pacific Northwest's potential as a competitor to supply that demand (Fdgs. 96-101), and the availability of effective competition to supply that demand in California (Fdgs. 74-89). It concluded on the basis of all relevant factors and all the evidence that the acquisition and merger did not have the prohibited effect on competition (Fdgs. 101-03, 108-09). Its decision is clearly correct on the law and the facts.

Since 1946, there have been only two purchasers of interstate natural gas in California: (1) PG&E and (2) the so-called "Southern California Companies", which are subsidiaries of Pacific Lighting Corporation and which have

made and continue to make purchases of natural gas jointly. (Fdg. 67)

PG&E, the largest operating public utility in the United States, for many years has been and is the sole distributor of natural gas to the public in northern and central California, and the only purchaser there of interstate natural gas (and intrastate production as well). (Fdg. 68)

In that part of California not served by PG&E, the Southern California Companies for many years have been and are the sole suppliers of interstate natural gas to the public including such "interruptible" industrial consumers as Edison,[10] and the Southern California Companies are together the only purchaser of interstate natural gas for resale in southern California. (Fdg. 69)

Accordingly, in the foreseeable future any sales of interstate natural gas in northern and central California and any such sales for resale in southern California must be considered as sales either to PG&E or the Southern California Companies and to no one else.

The dominant position of these two buyers in their respective territories is such that all main natural gas transmission lines within the state of California are owned either by PG&E or the Southern California Companies and all interstate deliveries of natural gas are made at the border of California to one or the other of the two buyers, or both (Fdg. 70).

By reason of their position, the two California buyers are also able to set their own respective buying policies and to select their own sources of supply.

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10. Sales are also made to Edison by Richfield Oil Corporation of some 42 million cubic feet per day from California fields under a contract entered into after this suit was brought and not subject to control by the Federal Power Commission or the State of California's Public Utilities Commission. (Fdg. 74)

As a matter of policy each of them has always purchased and is continuing to purchase the available supplies of intrastate natural gas in preference to interstate natural gas supplies (Fdg. 73). The California market is thus limited in respect to demand for interstate gas for resale not only by the needs of the two buyers, but to such of their needs as they consider in excess of intrastate supplies.

Beginning in 1956, prior to the acquisition, PG&E determined that it would acquire by purchase in Canada a source of supply to meet its future needs (*Sutherland*, DX Q, pp. 16, 21). It did so, and has caused this Canadian gas to be brought into this country through its affiliate, Pacific Gas Transmission Company ("PGT"), a pipeline constructed in 1960 at a cost of $133,000,000.[11] The PGT pipeline has a capacity of a billion cubic feet per day, of which to the present time PG&E uses only approximately 415 million cubic feet, leaving a remainder of approximately 600 million cubic feet daily to meet its requirements over the years to come. Thereby the market for interstate natural gas in PG&E's gas and electric service areas is foreclosed to any and all competition to the extent that such excess capacity should be availed of by PG&E in the future. (Fdg. 80)

In Southern California the situation is virtually the same. In 1958, the Southern California Companies, having declined an offer of PG&E to supply them (*Moulton*, DX S, p. 54), entered into a long-term gas supply contract with Transwestern Pipeline Company for a supply of 300 million cubic

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11. This figure relates only to the PGT line running from the International Border to California. The entire pipeline project to bring gas from the Province of Alberta to PG&E's service area in California also included lines in Canada and in California, and the completed line runs 1,400 miles and cost about $300,000,000 (DX H, p. 6). This averages out to a cost of about $214,000 per mile of pipeline.

feet daily, thus bringing to Southern California a new interstate pipeline organized by various producer interests and authorized to be constructed to the California border at a cost of $191,000,000. Significantly, Transwestern has an ultimate capacity of 640 million cubic feet daily.[12] (Fdg. 79)

In addition, there is still pending before the Federal Power Commission the so-called Rock Springs project, which offers to the Southern California Companies a long-term contract for 200 million cubic feet daily from the reserves of Colorado Interstate Gas Company, together with 100 million cubic feet daily of gas already committed by Pacific Northwest to Colorado Interstate and redirected by it to California and 100 million cubic feet daily from El Paso sources (*Boyd*, Tr. pp. 498-9).

Meanwhile, also, the Southern California Companies through an affiliate have been exploring for gas and have already acquired promising acreage, with a view to owning their own supplies and facilities (Fdg. 81).[13]

The Government's assertions as to future competition by Pacific Northwest in California, offered as a mere possibility and without reference to the status of the market, are based upon the thoroughly unsuccessful effort of Pacific Northwest in 1956 to promote a project in pursuance of which additional Canadian supplies would be procured, a new pipeline system constructed to California, and natural gas

12. According to the Annual Report for 1962 of Pacific Lighting Corporation (p. 5), published since the judgment of the District Court herein, the Southern California Companies have contracted with Transwestern for an additional 50 million cubic feet daily commencing in November of this year, and an additional 100 million cubic feet daily commencing in November 1965.

13. According to the Annual Report for 1962 of Pacific Lighting Corporation (pp. 6-7), the affiliate of the Southern California Companies has discovered new sources of supply in approximately 330,000 acres of leased rights in Utah and Colorado.

sold to Edison.[14] At the time of the acquisition Edison had never been a direct buyer of natural gas, and the Federal Power Commission and the Public Utilities Commission of the State of California have to date refused to sanction interstate sales of natural gas to Edison for boiler fuel purposes. The Federal Power Commission so held in 1959 in disapproving a contract between El Paso and Edison to provide interstate natural gas supplies in cooperation with the Southern California Companies, and insisted that sales to Edison for boiler fuel purposes should be through the Southern California Companies on an interruptible basis (Fdg. 95). *Cf. Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).

Since then Edison has contracted to buy its own supplies of natural gas from Humble Oil & Refining Company in

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14. The evidence is clear and without conflict in any particular that the effort was abortive and futile: the Edison project depended on participation by PG&E and the Southern California Companies; both PG&E and the Southern California Companies flatly refused to deal with Pacific Northwest for Canadian supplies; the proposed arrangement thereupon collapsed for that and other reasons. (Fdgs. 90-3) It is said by appellant (Jur. St., p. 21) that even the futile effort to meet Edison's desire for a firm supply in 1956 had a competitive effect in stimulating El Paso itself to offer Edison gas at lower prices. This is contrary to the evidence and findings. El Paso's offer was made only after Pacific Northwest was finished (*Kayser*, Tr. 249, 276), and Mr. Fish himself testified that El Paso had nothing to do with the collapse of his proposal (*Fish*, GX 2-23, p. 1124). There was also no reduction in El Paso's price of the nature claimed. The price basis was changed from a firm price to a formula price related to cost of service which would eventually have resulted in a price actually in excess of the firm price (*Boyd*, Tr. 504-05). It is also said by appellant (Jur. St., p. 10) that El Paso "abandoned its policy not to offer gas directly to Edison." This policy was not changed, because as the evidence shows without contradiction, El Paso agreed to sell under a three-way agreement in which its customer, the Southern California Companies, agreed to transport and deliver the gas to Edison subject to certain peaking requirements of the Southern California Companies (*Boyd*, Tr. 502). Indeed, the Southern California Companies participated in the negotiations (*Boyd*, Tr. 499-501).

Texas and has sought to bring this gas to California through the projects of affiliates of another major interstate pipeline company, Tennessee Gas Transmission Company[15] (*Boyd*, Tr. 509; Fdg. 82). Thus, Edison is not an available buyer to which Pacific Northwest as a separate entity might make a sale in the future.

The foregoing facts and other evidence concerning the state of the market in California thoroughly support the findings of the District Court that Pacific Northwest as a separate entity was not a substantial competitor or potential competitor in California (Fdgs. 97-101), and that after the acquisition there was strong and effective competition to meet any increased demand in southern California, with PG&E taking care of its own needs in northern and central California (Fdgs. 78-80). The proof, indeed, is that since the acquisition competition has increased, not lessened.

These conclusions are underlined by the fact that in the six years since the acquisition El Paso has not been able to sell any gas to California in excess of its commitments on that date, that its sales in California have slipped from 58% to 51% of the consumption of natural gas in California, and that at the time of the trial its annual volume of sales had diminished below that of three years before. (Fdgs. 88-9)

That Pacific Northwest was not a substantial competitor or potential competitor in California is further demonstrated by two basic facts. As had already been indicated,

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15. The application to the FPC for certification of the first of these projects, the so-called "Pemex" project, was withdrawn on January 3, 1963; about a month later an application was filed for the so-called "Gulf Pacific" project to transport to Los Angeles gas proposed to be purchased from the Texas producers jointly by Edison and the Department of Water and Power of the City of Los Angeles.

pp. 14-15 *supra*, the possibility of Pacific Northwest's serving California was solely on the basis of an additional Canadian supply (an additional supply which to this day has not materialized, Fdg. 96). The possibility of any such project was inevitably dependent upon the participation of PG&E, which has invariably rejected any such project because of its own project for the transportation of Canadian gas to California (*Moulton*, Tr. pp. 532-3; *Fish*, GX 299, pp. 42-3, 48, 63).

Another basic reason for Pacific Northwest's inability to compete in California was its serious financial difficulties and operating problems. The Jurisdictional Statement at one point charges the District Court with error in receiving evidence and finding on the question of Pacific Northwest's financial inability to compete in California, saying that this was a question exclusively for the Federal Power Commission (pp. 23-4). But elsewhere it argues that the Court should, indeed, have made the opposite finding, that resources of Pacific Northwest were such as to enable it to carry out the projects which it proposed to undertake (p. 18), and that, upon the evidence, Pacific Northwest was capable of bringing competition to this area because it theretofore persuaded the Federal Power Commission of the feasibility of its original project to the northwest and because of the confidence of Mr. Fish (since deceased) in his own personal ability to finance a line to California (p. 25).

The attempt of the Government to throw the ball of Pacific Northwest's financial ability back and forth between the District Court and the Federal Power Commission is unavailing at either end of the throw. In *California v. FPC*, 369 U.S. 482 (1962), this Court held that the question of a substantial lessening of competition is

in the domain of the Clayton Act and entrusted to the District Court. It does not seem open to question—indeed the effort in the Government's own Jurisdictional Statement to portray Pacific Northwest as a substantial competitive factor admits—that the ability to finance is a basic element in considering whether a pipeline is a substantial competitive factor in an industry where new projects cost many tens of millions of dollars. And, so far as the Federal Power Commission is concerned, that agency has already found, in the words of the Court of Appeals for the District of Columbia in *California v. FPC*, 296 F.2d 348, at 354 (1961), "that the elimination of Pacific as a potential competitor was not significant for two reasons: First, because of Pacific's poor financial condition it could not be considered a serious competitor to El Paso in California; . . ." The Court of Appeals found no error in this finding upon review.[16]

In this case, the District Court relied on the actual financial record of Pacific Northwest, and made its findings about Pacific Northwest's lack of financial ability to compete in California on such evidence as the following:

1. The testimony of the president of Pacific Northwest, Stuart Silloway, that it would have been difficult for Pacific Northwest to have obtained financing (DX G, pp. 128-31, 149-50);

2. The testimony of Mr. Silloway, confirmed by Mr. Fish, that because of lack of necessary funds, Pacific Northwest was unable in 1956 to conduct and encourage further development of its resources in the

16. Mere willingness or desire to make a proposal is not evidence of substantial competition in the natural gas industry. Section 7(e) of the Natural Gas Act provides that the applicant for a certificate be found to be "*able and willing*" to render the proposed service (emphasis supplied). 15 U.S.C. § 717 f(e).

San Juan Basin (*Silloway*, DX G, pp. 136-9; *Fish*, GX 299, p. 58);

3. Pacific Northwest's financial condition was such that it could not meet actual costs, let alone promote its market in the northwest which was its primary area of operations, or build extensions to give service (*Silloway*, DX G pp. 128-140; *Kayser*, Tr. pp. 577-9);

4. In 1957 Pacific Northwest suffered an operating loss of $2,067,005. For the three years 1957-59, Pacific Northwest's net earnings on an approximately $248,000,000 investment were $1.8 million in contrast to the predicted earnings of $23.7 million for those years on the basis of which Pacific Northwest was certificated in 1954 and 1955 as an economically feasible project (Fdg. 39).

A Pacific Northwest that had bitten off all it could chew (*Kayser*, Tr. 239), and with serious financial problems, cannot realistically be considered a company able to extend operations into a new area for new projects it did not have the resources to carry out.

The Government's claim of competition by Pacific Northwest in California is at best a claim of a mere possibility, based on sheer suggestion, lacking substance or proof.[17]

17. The Government's references (Jur. St., pp. 27-8) to the Mountain Home, Twin Falls and Rock Springs projects in this respect are either self-defeating or inaccurate. Mountain Home failed in 1955 precisely because, as indicated, the two California purchasers, PG&E and the Southern California Companies, refused to take the gas at Mountain Home (*Boyd*, Tr. 481-4); the PGT line built since then, as already indicated, has made any project for the sale of Canadian gas for the foreseeable future to PG&E by other than PGT entirely academic. El Paso's Twin Falls project for the sale of 400 million cubic feet daily to the Southern California Companies was based on the importation of the natural gas from

On the other hand, upon the facts the Court could find only that competition by Pacific Northwest in California was not a likelihood or a reasonable probability, and that since the acquisition competition in California or southern California has not been lessened and is not likely to be lessened. In fact, competition in California is more vigorous than it ever has been and promises to continue so in the future. As the Court pointed out in the *Brown Shoe* case, "the very wording of § 7 requires a prognosis of the probable *future* effect of the merger", 370 U.S. at 332 (emphasis by Court). Here, however, that "prognosis" was not merely theoretical.

Canada, and failed because after three years of delay the gas supply was still unobtainable (*Boyd*, Tr. 485-90). Indeed, no additional gas was obtained from Canada except 150 million cubic feet daily later delivered through PGT facilities to the northwest (*Moulton*, Tr. 532).

The Rock Springs Project calls for the sale of 400 million cubic feet per day to the Southern California Companies. Two hundred million of the daily supply comes from the supplies and reserves of Colorado Interstate; 100 million daily consists of a commitment by Pacific Northwest to Colorado Interstate re-directed from its market to California; and 100 million daily comes from El Paso (and not Pacific Northwest) reserves (Fdg. 83; *Boyd*, Tr. 498-9). The assertion in the Jurisdictional Statement that 200 million cubic feet daily come from Pacific Northwest reserves is contrary to the evidence. Rock Springs is a joint enterprise between Colorado Interstate Gas Company and El Paso (*Boyd*, Tr. 492-3). The Jurisdictional Statement speculates (pp. 28-30) that Pacific Northwest would have put together a similar joint enterprise with Colorado Interstate. The facts demonstrate that is not true. Apart from the finding of Pacific Northwest's financial inability to finance a project to California (Fdg. 98), it would have been clearly beyond its financial capacity to make the commitments which were required of El Paso in order to put the project together and to maintain it during the five years that it has been pending. As a condition to the joint venture, El Paso was required to take from Colorado Interstate and pay it for supplies in its Panhandle Field in Texas to the extent of 175 million cubic feet daily (later reduced to not less than 100 million) (*Boyd*, Tr. 496-7). Not only was this condition beyond the financial capacity of Pacific Northwest, but it was beyond its physical capacity, for Pacific Northwest has never had facilities so located as to receive this gas from Colorado Interstate.

The District Court had the benefit of some six years of actual experience since the acquisition to aid it in its determinations, and the Government in substance agrees that there have been no anti-competitive effects since the merger (Jur. St. p. 30).

Production and Purchase of Natural Gas.

The controlling facts on this issue are stated in the findings of the District Court, and they have not been disputed by the Government on appeal.

After 1954 there was little or no competition between El Paso and Pacific Northwest for the acquisition of gas reserves in the San Juan Basin or elsewhere. Prior to that time, although on occasions the two companies made offers to the same owners, there was no substantial competition between them in the San Juan Basin, and Pacific Northwest acquired 90% to 95% of its gas supplies without competition from El Paso. During this same period other interstate natural gas companies also were seeking to acquire gas reserves in the same area (Fdgs. 117-19).

By the date of the stock acquisition virtually all of the then known gas reserves in the San Juan Basin had been committed to interstate natural gas service (Fdg. 120). At that time, also, Pacific Northwest had an oversupply of reserves, much of which it was in no financial position to develop (Fdg. 121).

Since the 1954 decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, it has been settled that all sales by producers of natural gas in interstate commerce for resale are subject to regulation under the Natural Gas Act; prices in the San Juan Basin since 1960 have been effectively fixed by regulation by the Federal Power Commission, and there

is no evidence of sales below the area price so fixed (Fdgs. 110-14).

Appellant merely speculates that Pacific Northwest might have bid for reserves which future exploration may or may not reveal. At this point appellant is again asking this Court to set aside the District Court's findings by offering speculation upon speculation as a substitute for evidence.

CONCLUSION

The facts and the legal issues concerning El Paso's acquisition of Pacific Northwest have now been examined (1) in relation to the Natural Gas Act by the Federal Power Commission and (2) in relation to the Clayton Act, upon direction of this Court in *California v. FPC*, by the District Court. The FPC's finding that the acquisition was in the public interest was affirmed on review by the Court of Appeals for the District of Columbia. The underlying question of the validity of this acquisition under the antitrust laws has now been thoroughly litigated by the Department of Justice in the District Court and a decree rendered for the defendant upon findings amply supported by the evidence. The Government now comes to this Court acknowledging that the greater part of its complaint was not justified. As to the remainder, this appeal disputes findings of facts and raises no substantial question of law.

We respectfully submit that appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be summarily affirmed.

Respectfully submitted,

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